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IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC., GREATER MIAMI CHAPTER; MIAMI-DADE COUNTY STUDENT GOVERNMENT ASSOCIATION; MARK BALZLI, INDIVIDUALLY AND AS NEXT FRIEND TO HIS SON, AIDAN BALZLI,

Petitioners,

v.

MIAMI-DADE COUNTY SCHOOL BOARD; ALBERTO M. CARVALHO, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS, MIAMI-DADE COUNTY PUBLIC SCHOOLS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Eleventh Circuit assumed solely for purposes of the appeal below that the plurality opinion in *Board of Education v. Pico*, 457 U.S. 853 (1982), governed the Petitioners' First Amendment challenge to the Miami-Dade County School Board's removal of *Vamos a Cuba* from its elementary and middle school libraries. Under the *Pico* plurality, school officials may not remove books from library shelves "simply because they dislike the ideas contained in those books and seek by their removal to prescribe what should be orthodox in politics, nationalism, religion, or other matters of opinion." On the other hand, *Pico* does not prohibit the School Board from removing books "for legitimate pedagogical reasons such as concerns about accuracy of the book." As the Eleventh Circuit explained: "Whatever else it prohibits, the First Amendment does not forbid a School Board from removing a book because it contains factual inaccuracies, whether they be of commission or omission."

The question presented is whether the Eleventh Circuit properly applied this Court's decision in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), in concluding that the School Board's "motive" for replacing *Vamos a Cuba* is a "constitutional fact" subject to *de novo* review because it is "a crucial fact" that "determines the core issue of whether that removal violates the First Amendment" and in deciding the Board's action did not abridge any First Amendment right.

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Other Authorities

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Eugene Volokh & Brett McDonnell,
"Freedom of Speech and Independent Judgment Review in Copyright Cases," 107 *Yale L.J.* 2431 (1998) 35

I

Respondents Miami-Dade County School Board and Alberto M. Carvalho, in his official capacity as Superintendent of Schools, Miami-Dade County Public Schools, respectfully request that this Court deny the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

Because the Petitioners' Statement of the Case misstates the Record evidence relating to the book-challenge proceedings before the School Board, the district court proceedings and opinion, and the Eleventh Circuit opinion, the School Board respectfully submits the following Statement of the Case. In particular, the Petition represents that the Eleventh Circuit misapplied *Bose* by giving *de novo* review: 1) to the ultimate factual question of the School Board's motive for removing the Cuba Books; and also 2) to the district court's finding of historical facts and credibility determinations underlying the motive determination. However, *Bose* and her progeny expressly require *de novo* review of motive determinations if they are critical to resolution of the First Amendment issue. Moreover, the Eleventh Circuit expressly held that it would review for "clear error" the district court's "findings of ordinary historical facts." App.61a. None of the School Board members testified at the preliminary injunction hearing; rather, the evidence regarding their "motive" was offered in the form of the transcripts of the School Board's hearings and the historical record of the administrative process leading to those hearings. Thus, the Petitioners' representation that the Eleventh Circuit reviewed

de novo the district court's creditability determinations is false and misleading because the district court itself made no such determinations.

The Petition also argues the *Bose de novo* review standard should not have been applied to the district court findings because they were supportive of the Petitioners' First Amendment claims. However, Petitioners did not make this argument to the Eleventh Circuit either on direct appeal or on rehearing *en banc*. Accordingly, the issue is not properly before this Court. Moreover, there is not, as Petitioners suggest, a pronounced circuit split on this issue; and, even if there were, review is unnecessary as the Court is not likely to reach this issue to resolve this case.

A. The Record Below Reflects That The Cuba Books Are Rife With Factual Inaccuracies And Omissions

The book *A Visit to Cuba* and its Spanish counterpart *Vamos a Cuba* (the "Cuba Books") are part of a series of purportedly non-fiction geography books for children ages 4 to 8 that were contained in certain Miami-Dade County public elementary school libraries. App.2a-3a.[1] Dr. Juan Clark, Professor Emeritus of Sociology at Miami-Dade College, who has spent over 35 years researching, writing and lecturing on living conditions in Cuba, demonstrated at the preliminary injunction hearing that the Cuba Books

1. "App." refers to the Appendix to the Petition. A copy of the text of the Cuba Book (English version) is reprinted in the Appendix to this brief at 1a. A photocopy of this book is located at R:19-Ex.14. A review of the book reveals that it contains no political ideas whatsoever. Objections to it were based solely on its factual errors and omissions.

utterly fail to accurately portray life in Cuba. R:27-App.B. His "Content Analysis" demonstrated the Cuba Books have inaccuracies in at least 14 of their 29 pages of text. *Id.*¶12.

The Cuba Books fail principally because they completely ignore the factual consequences of the totalitarian system that pervades every aspect of daily life in Cuba. *Id.*¶8. Cuba has been governed by Fidel Castro, a totalitarian dictator, for over 48 years. *Id.*¶9. The Book makes no mention of him or his regime, which has essentially eliminated legal private enterprise, controls all means of production and education, has virtually destroyed the nation's economy, eliminated civil liberties, caused the execution of thousands, and imprisoned tens of thousands, causing such hardship that many Cubans would like to leave the island by any means possible. *Id.*¶¶9&15-20. The Cuba Books purport to portray life in Cuba, but without acknowledging the factual impact of totalitarianism on life in Cuba. According to Professor Clark:

> Ignoring this background societal fact is akin to describing Hitler's Germany in the late 30's, completely ignoring its highly repressive nature, with its concentration camps and the holocaust, and only touching on the great autobahn system developed, and the pulling of the country out of the deep depression, making it a great industrial and military power.

Id.¶10.[2]

---

2. Petitioners' expert also conceded that a totalitarian government pervades every aspect of everyday life of its citizens, and is nowhere reflected in the Cuba Books. R:62:108:9-13.

In the introductory paragraphs, the Cuba Books state: "People in Cuba eat, work, and go to school like you do." R:19-Ex.14:5. Thus, the premise of the Cuba Books is that the lives of people in Cuba are similar in important ways to the lives of children reading the books in the United States. R:27-App.B¶14. But this is entirely incorrect.

Cubans struggle every day to find enough food to eat. *Id.*¶16. Many children suffer from malnutrition. *Id.* The government controls all agricultural production, exporting the best food and rationing the rest. *Id.* It is illegal for the few small private farmers to sell any produce directly to the people; instead, it must be sold through government channels or outlets, or through the underground economy. *Id.* The rationed food, intended to last one month, barely lasts a couple of weeks. *Id.* The rest of the month, Cubans must resort to highly priced non-rationed black markets. *Id.* The books' claim that Cuban people regularly enjoy rice, beans, chicken and fruits like bananas, pineapples, oranges and mangoes is simply not correct. *Id.*¶17.

In Cuba's totalitarian regime, virtually everyone must work for the government. *Id.*¶18. It has been made a crime to run a private business or to privately practice a profession. *Id.* Because income from work is insufficient to make ends meet, many people are forced to work in the underground economy, running the risk of imprisonment, fines and/or confiscation of property. *Id.* Furthermore, people are forced to steal whatever they can from their work, and barter or sell those items to make ends meet. *Id.* There is forced child labor.

Id.¶20. Obviously, it is incorrect to say that working in Cuba is like working in this country. *Id.*¶18.

Education in Cuba is a rigid monopoly of the totalitarian system, since no private education is allowed. *Id.*¶19. School in Cuba is also a primary instrument of political control and repression. *Id.* The Cuban report card records not only the students' academic record, but also their political record and that of their parents. *Id.* Not having a "political stain" on that record is crucial to having access at the university level, since "the universities are for the revolutionaries." *Id.* If students are not members of the "Union of Young Communists," certain careers, such as psychology, journalism and law are precluded to them. *Id.*

The Cuba Books state that: "All school children do some kind of work during their school day. Some children work in gardens. Older children may work in factories." R:19-Ex.14:23. This text sanitizes the harsh reality of life for young students in Cuba. R:27-App.B¶20. From the sixth grade on, they are forced to go to the countryside for a period of 45 days to do unpaid agricultural work, fulltime. *Id.* In senior high school, all children must do unpaid agricultural work, on a permanent basis, alternating a half-day in the fields and a half-day in the classrooms. *Id.* They do not work in gardens for part of their school day as the text states. *Id.* Cubans do not study like children in America, where child labor laws protect them from the forced labor to which Cuban children are subjected. *Id.*[3]

3. The Cuba Books reflect many other inaccuracies relating to architecture, transportation, religion, ethnic origins, and recreation. *Id.*¶¶21-25.

None of Petitioners' experts who testified at the preliminary injunction hearing denied these realities of Cuba. Their principal expert, Professor Lisandro Perez, candidly admitted:

> Rationing of consumer goods, indoctrination in schools, limitations and prohibitions on entrepreneurship, urban decay, government-controlled markets, austerity in dress, overcrowded mass transit, tourist-only beaches, exclamations of religious fervor before firing squads, the politicization of university admissions, and more, *have been part of the reality of Cuba.*

R:19-Ex.30¶8; R:62:99-107. Moreover, Petitioners' experts acknowledged that the everyday realities of Cuba's totalitarian regime are not reflected in the Cuba Books. R:19-Ex.28¶15&Ex.29¶18; R.62:77-78,111. Nor can it be said that the Cuba Books could not have been written accurately because they were intended for very young readers. For example, the Cuba Books could have stated, "People in Cuba *do not* eat, work, and go to school like you do."

B. The Book Challenge

On April 4, 2006, Juan Amador, the parent of a student at the Marjorie Stoneman Douglas Elementary School, filed a complaint regarding *Vamos a Cuba*. R:19-Ex.32. Mr. Amador objected to the material because: "As a former political prisoner from Cuba, I find the material to be untruthful" and it "aims to create

an illusion and distort reality." *Id.* Mr. Amador recommended that the Book be replaced with "[a]ny material that truly reflects the plight of the Cuban People of the past and present." *Id.*

1. The SMRC review

An eight-member "School Materials Review Committee" ("SMRC"), whose membership is designated by rule and selected by the principal, was convened. R:19-Ex.10. The SMRC considered whether the information stated in the Cuba Books was factually accurate and developmentally appropriate, but not whether there were omissions which rendered the book unsuitable. R:62:40-41. One SMRC member identified factual inaccuracies in the book, including that it improperly suggested a parallelism between Cuba and the life of the reader. R:19-Ex.10:71; R:62:37. Nevertheless, the SMRC voted 7-to-1 to retain the Books. R:19-Ex.10:73-80.

On April 18, 2006, Board Member Bolaños introduced a proposal to remove the Cuba Books from all school libraries because they did not meet the Board's educational criteria. R:19-Ex.19. Mr. Bolaños' proposal identified various distortions in the Books, including the premise that life in Cuba is like life in this country. *Id.* The Board debated the inaccuracies in the Books, but ultimately voted to allow the administrative process to run its course. R:19-Ex.33.

2. The appeal to the DMRC

Mr. Amador appealed the SMRC decision, R:19-Ex.8., and the Superintendent of Schools convened a seventeen-member District Materials Review Committee ("DMRC"), a committee designated by rule and appointed by the Superintendent, to consider the appeal. R:19-Ex.7. DMRC Chair Dunbar testified that the focus of the Committee was on the structure, vocabulary and graphics, and not the factual inaccuracies which she considered to be "political content." R:62:56,72-73. The DMRC voted 15-to-1 to retain the Books with Representative Rivera resigning from the Committee. R:19-Ex.36:3-5.

On May 22, 2006, the Superintendent of Schools prepared a recommendation to the DMRC which suggested the inaccuracies in the Books could be addressed without removing them from the library. R:19-Ex.5:14. He proposed that: 1) other books which present a more accurate and complete description of life in Cuba could be purchased; 2) the Cuba Books could be checked out only with parental consent; and 3) a bookplate could be placed on the Books warning children that they are inaccurate and recommending accurate ones. R:19-Ex.5:14. The proposed bookplate read as follows:

> ATTENTION STUDENTS AND PARENTS
>
> This book was purchased by your school as part of a series of books on many foreign countries. Some of the information provided in this book about life in Cuba under that

> nation's communist dictatorship is incorrect or incomplete enough to be inaccurate. For an accurate depiction of life in Cuba, Miami-Dade County Public Schools recommends the following books that can be found in this school's library.

On June 8, 2006, the Superintendent nevertheless affirmed the DMRC's recommendation. R:19-Ex.3. Mr. Amador appealed to the Board. R:19-Ex.2.

3. The Board's vote to replace the Books with more accurate works

The Board held a public hearing on June 14, 2006. R:19-Ex.34. Its attorney instructed the Board to hear the complainant, deliberate on the matter publicly, and render a decision based upon the record. *Id.*4-5. Juan Amador first explained that his goal was not to censor anything but to assert "the right that we have as parents to oversee the education of our children." *Id.*6. He stated the Cuba Books do not "reflect the reality" of life in Cuba and that while other "parents have the right even to think that lying to their children is a good thing, I don't." *Id.*7.

The Petitioners attempt to show that the Board's June 14, 2006 decision to replace the Cuba Books was "politically motivated" by selectively quoting out of context statements of the Board Members to the effect that the book is "offensive to us as a community." Pet.6. But they fail to disclose the statements made by the Members which show that they were offended because the Books falsely and inaccurately portray life in Cuba as a matter of fact, not political ideology.

For example, Chairman Barrera explained the issue was whether the Cuba Books contained inaccuracies and omissions which rendered them educationally unsuitable and opined they contained many inaccuracies. *Id.*9-14. He stated he had read about sixteen of the Books in the series and that they "paint[] life in those countries with the same brush, with the same words. Basically, it changes the pictures, it changes the names of the foods, but it doesn't really talk about the richness that we have in all these cultures." *Id.*9-10.

Chairman Barrera rejected the suggestion that the opposition to the Cuba Books was censorship:

> Censorship is when you want to stop somebody from giving another opinion, something that goes against what you believe in.
>
> In this particular case, when I read the book, it doesn't really give an opinion, what it does is give a lack of information, and it's in that lack of information that I think we as the Cuban community are offended.

*Id.*13. He stated that since the same flawed approach was present throughout the series, the Books should be replaced with more accurate ones:

> What I can support is the replacement of this book with a book that really talks about the richness and culture that the Cuban people have lived and, if it was up to me, I would replace the whole series, because those books do not do justice to those 24 countries, and I

> think we owe it to the students in Miami-Dade County public schools to give them the best education possible.

*Id.*15.

Member Rivas Logan agreed, noted library books are routinely replaced, and concluded:

> Mr. Chair, I'd like to make a motion to replace the series with a new and updated series, which is nothing different than what we're going to be doing across this country, and across this state, and probably across the nation in every single school.

*Id.*17,18.

Member Bolaños then explained that the Board Rule "sets forth very clear educational standards that must be met by books that are placed in our school library. This book does not meet those standards, that is crystal clear." *Id.*19. He observed that "if we recognize that this book due to its acts of commission, and omission does not teach our children the truth about Cuba, then it should be removed from our public school libraries, we have that sacred responsibility." *Id.*20. Board Member Perez concurred with Mr. Bolaños. *Id.*26.

Member Tabares Hantmen commented:

> The curriculum that is taught in our schools is an essential part of raising our children. I expect and I would also demand that the books

> in our school libraries are accurate, honest, truthful and educational.
>
> A book that misleads, confounds or confuses has no part in the education of our students; especially, most especially elementary school students, who are very impressionable and vulnerable, and the book Vamos a Cuba does just that.
>
> ...
>
> And I read the book, and in many pages, I would say at least 14 omissions or statements that are not true, so that's why I said that this is not about censorship or banning. This is about a book that is not accurate, and there's nothing that—I cannot support this book in our libraries.

*Id.*23,24-25.

All eight Board Members who spoke, and the student government representative, acknowledged that the Cuba Books contain inaccuracies. Six voted that the inaccuracies rendered the Books unsuitable for young school children. One member and the student representative thought the inaccurate books should be used to teach 5-to-7 year-olds that not all resource materials are truthful. *Id.*37,27-29. And one member believed the inaccuracies were immaterial because the review committees had so concluded. *Id.*35.

Ultimately, the Board voted six to three to replace the geography series with a more accurate set. R:19-Ex.15. The Final Order states:

> The foregoing is based upon the findings reflected by the record of these proceedings, and more specifically the finding that the book is inaccurate and contains several omissions. It is further ordered that, this book and the series it is a part of, be replaced, throughout the school district, with a more accurate set of books that is more representative of actual life in these countries.

R:19-Ex.15.

C. The District Court's Entry Of A Preliminary Injunction "Reversing" The Board's Vote

On June 21, 2006, the ACLU and the Miami-Dade County Student Government Association filed a complaint against the School Board and the superintendent of schools alleging that the Board's decision to replace the Cuba Books violated the Petitioners' First Amendment right to access to information because the removal decision was motivated by the Board's disapproval of the viewpoint of the books.[4]

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4. Petitioners seek review of the Eleventh Circuit's reversal of the Cuba Books' removal on First Amendment grounds only. They do challenge circuit court's finding that Petitioners lack standing to challenge removal of the books in the series other than the Cuba Books. Nor do they seek review of the circuit court's due process holding.

On Friday, July 21, 2006, the district court held an evidentiary hearing on the Petitioners' request for temporary injunction. The court took testimony from twelve witnesses in the form of direct evidence presented through affidavits, allowing very brief live cross-examination. None of the School Board members who voted on the removal of the Cuba Books testified at the hearing. Instead, the extensive transcripts of their public deliberations were filed with the court. The live witnesses included the Petitioners, certain members of the SMRC and DMRC, and experts who testified regarding the accuracy and educational suitability of the books. *See, generally*, R:62.

The following Monday, July 24, 2006, the district court issued an 89-page order granting Peitioners' motion for preliminary injunction. The district court adopted the *Pico* plurality of Justice Brennan and concluded that "the majority of the Miami-Dade County School Board members intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision." App.265a. In reaching this conclusion, the district court relied entirely on the administrative record relating to the book challenge including the transcripts of the hearings before the School Board. App.265a-266a. The district court noted that "[i]ndicia may be found both in the content of the debate and the means of its presentation." App.269a. The district court also relied upon "the broad sweep of the School Board's action," App.270a, and the "Board's failure to consider, much less adopt, the recommendation of the two previous committees, and that of the School Superintendent, to

leave the books on the library shelves because they were educationally suitable." App.271a. The district court also agreed with the expert who testified that the books were educationally suitable notwithstanding their inaccuracies. App.271a. Since none of the School Board members testified regarding their motives for removing the Cuba Books, the district court could not and did not make any credibility determination regarding their motives.[5]

D. The Eleventh Circuit's Decision

The Eleventh Circuit reversed the preliminary injunction in an opinion dated February 5, 2009. In pertinent part, the Eleventh Circuit first addressed the parties' arguments regarding the legal standard which should govern the Petitioners' First Amendment challenge.

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5. The Petition misleadingly suggests that the district court made credibility determinations regarding the School Board's motive because it resolved in Petitioners' favor a disagreement between the parties' experts regarding the educational suitability of books which all admitted failed to disclose the reality of life in Cuba and misleadingly suggest that life in Cuba is like life in the United States. Pet.14-5. However, that dispute did not go to the School Board's motive for removing the Cuba Books but rather to their educational suitability, an issue which it is well settled is not the proper subject of judicial inquiry. *Pico* plurality at 871; *see, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the states, and of school officials, consistent with fundamental constitutional safeguard, to preserve and control conduct in the schools.") (citations omitted).

1. The applicable First Amendment standard

The School Board's basic argument was that under any of the possible tests that could be applied to the School Board's replacement action, it was constitutional given the factual errors and omissions in the books that rendered them academically unsuitable even under the *Pico* plurality standard.

The School Board also argued that under governing precedent, the process of selection and removal of books from a public elementary school library over which it maintains absolute and ultimate control constitutes "government speech." Init.Br.45-50. *See, e.g.*, *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005) (*quoting United States v. American Library Ass'n*, 539 U.S. 194, 204 (2003) ("as a librarian, the government must 'have broad discretion what material to provide to [its] patrons.'"). And that the government is free to have a viewpoint when speaking. Init.Br.48.

Alternatively, the School Board asserted that elementary and middle school library books are "curricular" in the Miami-Dade County School system and, therefore, under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Board may remove the Books so long as these actions "are reasonably related to legitimate pedagogical concerns." Init.Br.42-45. Assuming the *Hazelwood* test applied, the "content-based" removal of the Cuba Books was reasonably related to the pedagogical concern that the books are inaccurate and rife with omissions in their portrayal of life in Cuba.

The Petitioners argued that the Eleventh Circuit should apply the *Pico* plurality's standard that school officials "may not remove books from library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what should be orthodox in politics, nationalism, religion, or other matters of opinion." Corr.Ans.Br.35. The School Board argued that the Eleventh Circuit should not follow the *Pico* plurality because the more persuasive opinion authored by Chief Justice Burger and joined by Justices Rehnquist, Powell and O'Conner rejected any authority of the Supreme Court to second-guess the democratically-elected School Board's decisions to remove school library books based on its understanding of community values and its authority to inculcate them. Init.Br.35-36,38. The School Board argued in the alternative that, if the court were to follow the Brennan plurality opinion, the Board replacement order would be proper because even Justice Brennan recognized that school books should be removed if their content is deemed "educationally unsuitable," and, that standard must apply to geography books that are so rife with omissions and inaccuracies that they falsely portray countries they purport to depict. Init.Br.41

The Eleventh Circuit concluded that it did not have to decide which standard should govern the First Amendment challenge because:

> [e]ven if [Petitioners] won the argument about the applicable standard and got the one of their dreams, . . . [they] still lose if the School Board removed *Vamos a Cuba* not for those prohibited reasons but instead, as the Board

> insists, for legitimate pedagogical reasons such as concerns about the accuracy of the book.

App.51a.

2. The applicable standard of review

The Eleventh Circuit then considered the appropriate standard under which to review the district court's conclusion that the School Board had an "improper motive" in deciding to remove the Cuba Books. The court noted that while ordinarily district court fact findings are reviewed for clear error, "[w]here the First Amendment Free Speech Clause is involved our review of the district court's findings of 'constitutional facts' as distinguished from ordinary historical facts, is *de novo.*" App.53a. Relying on this Court's precedents, the Eleventh Circuit explained "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." App.57a-58a (*quoting Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995)).

The Eleventh Circuit concluded, "[u]nder the standard that we are assuming applies in this case, the School Board's motive in removing *Vamos a Cuba* is a constitutional fact, a 'crucial fact' that determines the case issue of whether that removal violates the First Amendment." App.58a. Under *Bose*, the "conclusion of law as to a federal right [First Amendment] and (the)

finding of fact [motive] are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts" and "make an independent examination of the whole record." App.60a-61a. (*quoting Bose*, 466 U.S. at 508). "In order to fulfill that responsibility, we must review *de novo* the district court's findings about the Board's motive, which depends on constitutional facts rather than historical ones." App.61a.

Significantly, the Eleventh Circuit noted that it would review for "clear error" the district court's finding of ordinary historical facts:

> Applying that approach here, we will review for clear error only the district court's findings of ordinary historical facts. Those are facts about the who, what, where, when, and how of the controversy—what the School Board did, when and how it acted, what various members of the Board said, and so forth. . . .
>
> By contrast, under the assumptions about the law that we have made for purposes of deciding this case, we must determine the "why" facts. Those are the core constitutional facts that involve the reasons the School Board took the challenged action—its intent, or more accurately, its motive for removing copies of the *Vamos a Cuba* book from the school libraries.

App.61a-62a. While there was evidence presented at the preliminary injunction hearing, none of the School Board

members testified at the hearing. Thus, there were no credibility determinations made by the district court regarding the School Board's motive for the court of review.

3. The Eleventh Circuit's decision

Instead, the Eleventh Circuit reviewed the largely undisputed record below and found:

> The record shows that the Board did not simply dislike the ideas in the *Vamos a Cuba* book. Instead, evidence, including both sides' experts agreed that the book contained factual inaccuracies.

App.63a. In particular, the court examined the entirety of the administrative-review process from Amador's initial complaint that the book "portrays a life in Cuba that does not exist" (App.64a); to the School Board's deliberations about the inaccuracies in the book; to the Board's formal order of replacement, which expressly found that "the book is inaccurate and contains several omissions" and required that it "be replaced, throughout the school district with a more accurate set of books that is more representative of actual life" in Cuba. App.73a. The Eleventh Circuit concluded that "[t]he consistency throughout the process of the inaccuracy complaints and the consistency of the explanations of the Board members who voted to remove the book evidence that the Board's motive was what it stated—that the Book was ordered removed from school libraries because it is full of factual errors. *Id.*

The Eleventh Circuit found further evidence of the School Board's motive in the fact that "the book indisputably does contain inaccuracies." App.74a. As the court explained:

> There was no evidence at the preliminary injunction hearing that the picture of life in Cuba that *Vamos a Cuba* presents is an accurate one. No one who testified there stated, or even suggested, that it is. To the contrary, the evidence at the hearing proved beyond dispute that the book contains substantial factual errors.

App.82a. In particular, the court concluded the most significant inaccuracy was the book's statement that "People in Cuba eat, work and go to school like you do." App.76a. The Eleventh Circuit found the undisputed record showed "It is simply not true that people in Cuba 'eat, work and go to school' the same way that American children do." *Id.*

As the court explained:

> All of the experts in this case agreed that people in Cuba do not live like people in the United States. As the plaintiffs' own expert explained, they don't because "[r]ationing of consumer goods, indoctrination in schools, limitations and prohibitions on entrepreneurship, urban decay, government-controlled markets, austerity in dress, overcrowded mass transit, tourist-only beaches, exclamations of religious fervor before firing squads, the politicization of university

> admissions, and more, have been part of the reality of Cuba."

App.89a. The court also noted that:

> The real debate among the experts in the case, who all agreed that *Vamos a Cuba* was inaccurate, had to do with educational suitability. The experts disagreed about whether a truthful account of life in Cuba could be presented in an age-appropriate way.

App.85a. However, the Eleventh Circuit explained that "[i]n examining and deciding whether *Vamos a Cuba* was educationally suitable, or would be made more or less suitable if it more accurately described the conditions in Cuba, the district court stepped well beyond the proper bounds of the judiciary." App.108a-109a.[6]

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6. In rejecting the district's court suggestion that unconstitutional motive was demonstrated by the fact that the majority of the School Board members were Cuban and some said they were offended by the books, the Eleventh Circuit explained:

> To the extent that is an argument, it confuses interest with motive. Cuban Americans are more interested than others in removing a book that falsely portrays, to the upside, life in Castro's Cuba, but that does not mean their motive for wanting the book removed is anything other than the fact that the book contains falsehoods. If the book accurately discussed life in Cuba, they would have no reason to have it removed.

App.105a-106a.

The Eleventh Circuit concluded:

> We find from the evidence in this record, including the School Board majority's consistent statements that it was removing *Vamos a Cuba* from the school library shelves because of factual inaccuracies and the undisputed fact that the book does contain inaccuracies, that those inaccuracies were what motivated the Board. If there had been no factual inaccuracies, the book would not have been removed. While the fact that the Board members who voted to take the action are Cuban American may explain their interest in it, that does not impugn their motive. The stated motive was not a pretext or a guise for viewpoint discrimination.

App.113a.

REASONS FOR DENYING THE PETITION

A. The Eleventh Circuit Correctly Applied The *Bose* Standard Of Review

The Petitioners argue that the Eleventh Circuit misapplied *Bose* and her progeny because: 1) questions of state of mind, such as motive or intent, are not subject to *de novo* review even if they are the ultimate questions upon which the constitutional question turns; and 2) in conducting a *de novo* review on the ultimate question of motive, the School Board failed to defer to the district court's findings on subsidiary historical facts and credibility determinations. The Petitioners are mistaken on both counts.

First, state of mind or motive is subject to *de novo* review under *Bose* when it is the ultimate question on which the constitutional question turns. It is well-settled that, in cases raising First Amendment issues, an appellate court has an obligation to "make an independent examination of the whole record" in order to ensure that "the judgment does not constitute a forbidden intrusion in the field of free expression." *New York Times v. Sullivan*, 376 U.S. 254, 284-86 (1964). In *Bose*, this Court held that a district court's finding of "actual malice," *i.e.*, the defendant's state of mind, in a libel case is a "constitutional fact" subject to *de novo* review of the appellate court because it is the dispositive issue upon which the constitutional question turns. *Bose*, 466 U.S. at 510-14; *cf. id.* at 518 (Rehnquist dissenting) (arguing that appellate court should not make *de novo* determinations about "the state of mind of a particular author at a particular time").[7] In other First Amendment cases, courts have reviewed *de novo* the state of mind or intent of government actors, when that state of mind inquiry was the ultimate question on which the First Amendment issue turned. *See, e.g.*, *CAMP v. City of Atlanta*, 219 F.3d 1301, 1316-17 (11th Cir. 2000) (conducting *de novo* review of whether ordinance was content-neutral and independently "examining the intent behind the...Ordinance"); *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999) (whether defendant was motivated by "actual malice" is based upon an "independent examination" of the record in a

7. "Actual malice" is a pure state of mind inquiry that "requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statements were false or that he subjectively entertained serious doubt as to the truth of his statement." *Id.* at 511n.30.

First Amendment case). As this Court explained in *Hurley*, "[t]his obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the rear or far side of the line of constitutional protection." *Hurley*, 515 U.S. at 567. Thus, Petitioners' contention that *Bose* does not authorize *de novo* review of state of mind inquiries, such as motive or intent, is simply mistaken.

Second, *Bose* and her progeny have made clear that while in a First Amendment case the court is required to make an independent examination of the record and review *de novo* the ultimate "constitutional facts," the court should still give due deference to the trial court with respect to its findings on subsidiary historical facts and credibility determinations. *See Bose*, 466 U.S. at 499-500, 514n.31 (constitutionally-based rule of independent review permits "due regard" to be "given to trial judge's opportunity to observe the demeanor of witnesses" and "only those portions of the record which relate to the actual-malice determination must be independently assessed."). *See also Harte-Hanks Commc'ns Inc. v. Connaughton*, 491 U.S. 657, 688 (1989):

> Although credibility determinations are reviewed under the clearly-erroneous standard, because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses,' the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made

> to see . . . whether they are of a character which principles of the First Amendment . . . protect'

(citations omitted). As shown above, the Eleventh Circuit deferred to the trial court's findings on historical facts, and there were no credibility determinations to be made regarding the School Board's motive because none of the School Board members testified at the preliminary injunction hearing. *See supra.* Thus, Petitioners' contention that the Eleventh Circuit misapplied *Bose* is simply mistaken.

B. This Court Should Not Accept Review Of This Case To Determine Whether "Independent Review" Of Constitutional Facts Are Warranted When The District Court Enforces—Rather Than Abridges—A First Amendment Right

1. Petitioners' second question presented was never presented to or passed upon by the court of appeals and thus is not properly before the Court

The question of whether *de novo* review should be applied asymmetrically in cases implicating First Amendment rights is not one that this Court should entertain in this instance. In Petitioners' appellate briefs before the Eleventh Circuit, this issue was never pressed. Indeed, when petitioning for rehearing *en banc* before the circuit court, Petitioners did not even hint at the claim, even though the subject of their petition otherwise concerned the proper standard of review in

cases of this kind.[8] Likely because it was never presented by Petitioners below, this issue was also never passed upon by the Eleventh Circuit. Instead, for the first time, Petitioners now attempt to raise the issue of whether, because Petitioners initially prevailed on their First Amendment claim, the district court's findings of constitutional fact should be subject only to clear-error review. *See* Petition at 31.

Because it was not "pressed or passed upon below" by the circuit court, this argument is foreclosed. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976).[9] It is well established that "[t]his Court usually will decline to consider questions presented in a petition for

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8. Instead, Petitioners argued that the independent review undertaken by the Eleventh Circuit went too far, and that the court "explicitly undertook a *de novo* review of *all* the factual findings made by the district court in support of its decision, including (and impermissibly) the purely factual issues of motivation, intent, pretext and credibility, establishing a new standard of review for First Amendment cases." *See* Rehearing Petition at 2 (emphasis in original).

9. Among "the policies that animate the 'not pressed or passed upon below' rule" are "a constellation of practical considerations, chief among which is [the Court's] own need for a properly developed record on appeal." *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) (plurality opinion). As the Court has explained, the lower court should "have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that [the Court] might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits." *See id.* at 80. That simply is not possible here due to Petitioners' failure to raise the matter before the court of appeals.

certiorari that have not been considered by the lower court." *See Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988); *Walker v. Georgia*, 129 S. Ct. 453, 454 (2008) ("In its response to the petition, the State persuasively argues that petitioner did not raise and litigate these claims [below]. That argument provides a legitimate basis for this Court's decision to deny review.") (Stevens, J., statement respecting denial of certiorari); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258-260 (1987) (dismissing writ of certiorari as improvidently granted and noting that "[w]e ordinarily will not decide questions not raised or litigated in the lower courts"). *See also TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *Heller v. Doe*, 509 U.S. 312, 318-19 (1993); *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). *Cf. Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) ("As [appellant] concedes, he made this argument for the first time in his response to [appellee's] motion for rehearing in the Court of Appeals. His failure to raise this issue in a timely manner precludes our consideration.").[10]

10. That Petitioners are attempting to raise this argument to upset, rather than support, the judgment of the court of appeals is especially inappropriate. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001):

> Although in some instances we have allowed a respondent to ***defend*** a judgment on grounds other

(Cont'd)

In this case, Petitioners argued before the Eleventh Circuit panel that the "clearly erroneous" standard should apply to the review of the district court's determinations regarding the School Board's motivations and intent, not—as they do here—that it should apply to all factual findings any time a determination in favor of First Amendment rights is on appeal. Before that court, they maintained only that determinations of motivation and intention are outside that which must be reviewed *de novo* in First Amendment cases.[11] The panel majority rejected Petitioners' argument, however, finding that the School Board's motives were a constitutional fact subject to *de novo* review. *See* App.58a-59a:

> Under the standard we are assuming applies in this case, the School Board's motive in

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(Cont'd)

> than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive arguments ***attacking***, ***rather than defending***, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.

(internal citations omitted; emphasis supplied).

11. *See* Corr.Ans.Br.19-20:

> The School Board incorrectly characterizes certain factual decisions of the district court in this case as 'constitutional facts' to be reviewed by this Court [of Appeals] under the *de novo* standard. The district court's determinations with respect to the unconstitutional motivation of defendants is 'a quintessential factual question' and should be reviewed under the clearly erroneous standard.

> removing *Vamos a Cuba* is a constitutional fact, 'a crucial fact' that determines the core issue of whether that removal violates the First Amendment. . . . Our decisions show that we treat the few core facts that determine a First Amendment free speech issue as 'constitutional facts' subject to *de novo* review.

Neither the panel majority nor the dissent in any way touched upon the unpresented question Petitioners now raise. Thus, the issue Petitioners present here—whether the appellate court is barred from undertaking an "independent review" of a trial court's factual findings when those findings support a holding in favor of a First Amendment claimant—was neither "pressed or passed upon below" before the court of appeals.

When seeking review before the Eleventh Circuit *en banc*, Petitioners argued only that the panel had over-stepped the line and "explicitly undertook a *de novo* review of *all* the factual findings made by the district court in support of its decision, including (and impermissibly) the purely factual issues of motivation, intent, pretext and credibility, establishing a new standard of review for First Amendment cases." *See* Rehearing Petition at 2 (emphasis in original). Nowhere in that brief did they argue, as they do now, that *de novo* review in First Amendment cases should be one-sided in favor of free speech claimants, regardless of the kinds of facts at issue. And nowhere therein did they ask the full court to overrule on this question the holding of *Don's Porta Signs, Inc. v. City of Clearwater, Fla.*, 829 F.2d 1051, 1053n.9 (11th Cir. 1987), the Eleventh Circuit decision that "interpreted

[the Supreme Court's] decision in *Bose* as mandating an independent examination of the whole record in all cases involving First Amendment claims," *see Don's Porta Signs, Inc. v. City of Clearwater, Fla.*, 485 U.S. 981, 981 (1988) (White, J., dissenting from denial of certiorari), regardless of which party prevailed before the district court. Indeed, Petitioners' terse discussion of *Don's Porta Signs* constituted less than two sentences in their *en banc* brief, and did not in any way address, or even mention, Justice White's dissent from the denial of certiorari on the key issue they now attempt to present. *See* Rehearing Petition at 11-12,15. By Petitioners' failure, the Eleventh Circuit was deprived of the opportunity to consider in the first instance the continued validity of its precedent.

In sum, just as they neglected to do before the panel, Petitioners failed to "press" the issue they now raise before the court of appeals *en banc*. And, since the full court declined to rehear the case *en banc*, *see* App.292a, it cannot be said that the issue was "passed upon below" at the rehearing stage either. Clearly, decisions in this Court should not be rendered in a vacuum. And yet, that is exactly what Petitioners ask this Court to do here, even though it has been deprived, through Petitioners' failings, of the benefit of any opinion on this issue from the court below. Because this issue was neither "pressed [n]or passed upon below," this Court ought not entertain it here.

2. There is not a tight circuit split on this issue; instead, over the last fifteen years, there has been a consistent trend away from the asymmetrical standard of review advocated by Petitioners

Petitioners mistakenly assert that certiorari review is appropriate because the circuits are "closely divided" on the "important question" of whether the independent review standard applies when the findings below support First Amendment rights. Pet.31. As discussed below, Petitioners overstate the division among lower courts on this issue as well as the need for the Court's review in light of doctrinal development over the last fifteen years.

With regard to the purported 4-3 circuit split, the petition correctly identifies four circuit courts, relying on the Court's decision in *Bose*, that apply "independent review" of constitutional facts regardless of which side won below: the *First Circuit*, *see*, most recently, *Sullivan v. City of Augusta, Me*, 511 F.3d 16, 24-25 (1st Cir. 2007), *cert. denied*, 129 S. Ct. 112 (2008); the *Fifth Circuit*, *see Lindsay v. City of San Antonio*, 821 F.2d 1103, 1109 (5th Cir. 1987); the *Tenth Circuit*, *see*, most recently, *United States v. Friday*, 525 F.3d 938, 948 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009); and the *Eleventh Circuit*, *see Don's Porta Signs*, 829 F.2d at 1053, *cert. denied* 485 U.S 981 (1988).[12] The Petition fails

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12. As indicated above, this very question has been recently presented to this Court on certiorari petitions twice, in *Sullivan* (2008) and *Friday* (2009). In both cases, unlike here, the issue

(Cont'd)

to recognize, however, that there are five other federal circuit courts—the Second, Third, Sixth, Eighth, and D.C. Circuits—that join these courts in applying *Bose* review in First Amendment challenges that are successful in the district courts. *See Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520, 525-26 (6th Cir. 2007); *Bronx Household of Faith v. Bd. of Educ. of New York*, 331 F.3d 342, 348 (2d Cir. 2003); *Jacobsen v. City of Rapid City, S.D.*, 128 F.3d 660, 662 (8th Cir. 1997); *Tavoulareas v. Washington Post Co.*, 759 F.2d 90, 98 (D.C. Cir. 1985), vacated in part on reh'g, 763 F.2d 1472; *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 542 n.3 (3d Cir. 1984), vacated on other grounds, 475 U.S. 534 (1986).

These cases establish a clear and overwhelming trend away from adopting the asymmetric standard of review urged by Petitioners. Indeed, no circuit court has adopted the asymmetrical standard since the Fourth Circuit did so in 1993, *see Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993); and, prior to that decision, the last circuit court to adopt the asymmetrical standard was the Ninth Circuit in 1988 (before Justice White's dissent from the denial of certiorari in *Don's Porta Signs*). Courts are not "closely divided" on this issue. Rather, the clear majority of circuits review constitutional facts *de novo* in First Amendment cases, regardless of which party prevailed in the lower court.

(Cont'd)
was pressed or past upon in the circuit court. And, in both cases, the certiorari review was denied. This is not surprising because, as discussed below, there has been little conflict regarding this issue over the last fifteen years.

Moreover, this Court's 1995 decision in *Hurley* appears to have resolved any differences in the circuits. In *Hurley*, the Court reemphasized the need for independent review in First Amendment cases generally, and did not distinguish between those cases in which the First Amendment challenge succeeded in the district court and those in which it failed:

> [O]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. *See Bose*. . . . This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the ***near or far side of the line of constitutional protection***.

Hurley, 515 U.S. at 567 (emphasis added). In referring to this "obligation," the Court did not reserve the need for independent review only in those cases where the First Amendment claim failed in the district court. Instead, the court said that *de novo* review was necessary to decide those cases in which the conduct falls on either side of the "line of constitutional protection."

Academic commentators also have been critical of the asymmetrical standard. "In our view, independent judgment review of the idea-expression decision is valuable even when the defendant won at trial: Whoever

won, independent review should produce more refinement of the legal standard, something *Bose* says is constitutionally valuable." Eugene Volokh & Brett McDonnell, "Freedom of Speech and Independent Judgment Review in Copyright Cases," 107 *Yale L.J.* 2431, 2442 (1998).

The intervening decision in *Hurley*, combined with the trend away from, and criticism of, the asymmetrical standard, effectively eliminates any conflict in the circuits. The Court need not step in now; instead, it should wait to see if the asymmetric review reappears in any future case.

3. This case is not an ideal vehicle to resolve the asymmetric review issue because the Court could well resolve this matter without reaching that issue

This Court should not grant review of this case for the additional reason that, if jurisdiction is taken, the merits could well be resolved without reaching, let alone deciding, the asymmetric review issue. Eugene Gressman, et al., *Supreme Court Practice*, at 504 (9th ed. 2007). The School Board argued below several alternative grounds for affirming its book replacement Order that the Eleventh Circuit did not address but which this Court may more readily accept.

The Board argued that the process of selecting and removing books for its school libraries is "governmental speech" because it ultimately and absolutely controls this process to regulate the message the library collection sends, particularly to younger readers, relying

upon *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005); *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003); *Rosenberger v. Rector & Visitors of University of Va.*, 515 U.S. 819, 833 (1995); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); and *National Endowment For The Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J. concurring in judgment.) Subsequent to the decision of the Eleventh Circuit below, this Court decided *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125 (2009), a unanimous decision in which eight justices joined an opinion holding that the selection of monuments for a public park is "government speech" not subject to a First Amendment challenge based upon viewpoint discrimination because the government "effectively" controlled their messages by exercising "final approval authority" over their selection. *Pleasant Grove City* strongly supports the School Board's "government speech" argument here because the Board also controls the book selection process by exercising final approval authority over the books selected for, or removed from, its school library collection.

Second, the School Board contended that the opinion of the four dissenters in *Pico*, led by Chief Justice Burger and future Chief Justice Rehnquist, who were as numerous as the plurality led by Justice Brennan, is more persuasive and would be followed by this Court because it recognized the School Board is the democratically-elected, grassroots body the parents intended to govern the selection of books needed to inculcate democratic values in their children. This case is as good an example of the wisdom of the *Pico* dissenters as any could be, and would allow affirmance

of the Board without addressing the asymmetric review issue. Moreover, it is difficult to understand why important interests such as "government speech" or local democratic control of the elementary school library collection, should not be protected by *de novo* review, even if lesser governmental interests are not.

Finally, this Court's recent decision in *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007) strongly supports the Board's argument made in reliance on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266; *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), that the rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, that student rights must be applied in light of special characteristics of the school environment, and that replacement of school library books need only serve "some legitimate pedagogical interest." As a majority of justices have held "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *City of Erie v. Paps A.M.*, 529 U.S. 277, 292 (O'Connor, J. for plurality of four justices, 307 (Scalia, J. and Thomas, J. concurring in judgment) (2002); *U.S. v. O'Brien*, 391 U.S. 367, 383 (1968). Students simply do not have the right to tell the Board what elementary library school books must be selected for the school library, or which may not be replaced. The fact that factual errors or material omissions in a book that render it academically unsuitable also may offend some in the local community, or on the Board, does not create a right in these young students to prevent replacement of the academically deficient books with more accurate ones. Again, if this case were accepted for review and decided upon this ground, the asymmetric review issue would not be addressed.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

*A Visit to Cuba**

by Alta Schreier

Cuba
Cuba is a country in the **Caribbean Sea**, south of Florida. It is one big island with some smaller ones nearby. People in Cuba eat, work, and go to school like you do. Life in Cuba is also **unique**. [pp. 4-5].

Land
Cuba has flat **plains** that are used for farmland. There are also sandy beaches and **coral reefs**. The weather in Cuba is very warm. There are mountains in Cuba, too. The mountains are covered with forests. [pp. 6-7].

Landmarks
The **capital** of Cuba is Havana. The Capitol building in Havana looks like the United States Capitol building in Washington, D.C. Morro Castle is an old fort. It was built by people from Spain. It was used 400 years ago to **protect** Havana from pirates. [pp.8-9].

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* The following is the text (without illustrations) of the *A Trip to Cuba* book, English counterpart to *Vamos a Cuba*. A photocopy of this book, in its entirety, is located in the Record at 19, Exhibit 14. Words shown in bold are defined in a glossary located at the end of the book.

Appendix

Homes

Most Cubans live in cities. The cities are crowed, so many people live in apartment buildings. There are some beautiful old buildings. There are new buildings, too. Most homes in the country are simple. Some are made of wood from **palm** trees. They have roofs of palm leaves or grasses. [pp. 10-11]

Food

White rice is the most common food in Cuba. Sometimes it is mixed with black beans. Chicken with rice is popular, too. Many kinds of fruits grow in Cuba. Bananas, pineapples, oranges, and mangoes are favorites. **Yucca** is a plant that people eat as a vegetable. [pp. 12-13].

Clothes

Cubans dress to keep cool in the hot weather. Many children wear shorts and T-shirts. For special festivals, men wear white pants and white shirts. Women wear colorful ruffled dresses. [pp. 14-15].

Work

Some Cubans work in factories that make cigars or sugar. There are also factories where people make cloth, shoes, paper, and farm tools. In the country, there are large farms. The workers there grow **sugarcane** and tobacco. There are also farms for vegetables, such as lettuce, onions, and carrots. [pp. 16-17]

Appendix

Transportation
There are not many cars in Cuba. In the cities, some people drive old cars from the United States. Most Cubans travel by bus. On country roads, people use animals to pull wagons. Animals are also used to help farmers in their fields. [pp. 18-19].

Language
Most people in Cuba speak Spanish. This is because Cuba was **settled** by people from Spain. Spanish uses some of the same letters as English. There are also some extra letters in the Spanish alphabet. [pp. 20-21].

School
Cuban children go to school between the ages of five and fourteen. They wear uniforms to school. There are different colored uniforms for different ages. In school, children learn math, reading, and history. All schoolchildren do some kind of work during their school day. Some children work in gardens. Older children may work in factories. [pp. 22-23].

Free Time
Baseball is Cuba's national sport. Cuba won the gold medal in baseball in the 1996 **Olympic Games.** Cuba's beaches are good for swimming and boating. People like to dive and fish. There are also rowboat and sailboat races. [pp.24-25].

Appendix

Celebrations

Cuba's biggest celebration is called Carnival. It is held on July 26. People dance and sing at this festival. Some people who **settled** in Cuba were Roman Catholics. Other people who lived in Cuba were from Africa. So some Cuban celebrations mix African and Catholic beliefs. [pp. 26-27].

The Arts

Cuban music mixes sounds from Africa and Spain. Musicians use guitars, drums, and **gourds** to make music and a beat. Dances from Cuba are popular around the world. In one valley in Cuba, there are large, colorful paintings on some rocks. Inside the rocks are caves. The caves have paintings made by people who lived in Cuba about 1,000 years ago. [pp. 28-29].